[1999–00 Gib LR 534]

BITTON v. ATTORNEY-GENERAL

SUPREME COURT (Schofield, C.J.): September 22nd, 2000

Criminal Law—breach of the peace—causing breach—offence under Criminal Offences Ordinance, s.35 if words or behaviour such that breach "may be occasioned"—no need to show that breach likely to occur—duration of incident and proximity between accused and complainant relevant

Criminal Law—breach of the peace—public place—staircase and landing leading to private dwelling not "public place" within meaning of Criminal Offences Ordinance, s.35—charge should refer to "staircase or other means of access to any occupied premises" if incident occurred there

The appellant was charged in the magistrates' court with behaving in a manner whereby a breach of the peace may have been occasioned and resisting a police officer acting in the execution of his duty.

The appellant was involved in an altercation with his landlord regarding the removal of his furniture from a rented flat. The flat was situated on a landing at the top of a stairway above a shop. A glass door separated the stairway from the shop entrance way. The police were called twice: On the first occasion a police officer found the appellant arguing with the landlord in the stairway and being insulting. He left when the appellant agreed to get help in removing his belongings. The second time, three other officers attended, and found the appellant shouting, swearing in Spanish at the landlord and being aggressive. An eye-witness said there had been a scuffle but he refused to make a statement. When the appellant refused to calm down after several warnings, he was arrested, but tried to release himself. He was restrained and detained in custody.

The appellant was convicted on both charges.

On appeal, he submitted, *inter alia*, that for the purposes of s.35 of the Criminal Offences Ordinance (a) insults alone could not amount to behaviour likely to cause a breach of the peace unless they were shown to have been likely to provoke a violent reaction in the recipient; (b) the incident had not taken place in a public place, but in the stairway and on the landing outside his flat, and the charge had not been framed to include that location; and (c) since the police had arrested him unlawfully, the arresting officer had not been acting in the execution of his duty.

The Crown submitted in reply that (a) in view of the proximity of the appellant to his landlord and the duration of his insulting behaviour, the court had properly found that a breach of the peace might have been occasioned; (b) the appellant was guilty of the offence, since the staircase in question was adjacent to shop premises, which constituted a public place, and the offence created by s.35 could be committed, *inter alia*, in a staircase or other means of access to any occupied premises; and (c) the arresting officer had acted in the execution of his duty in arresting the appellant, since the police had had reasonable cause to apprehend the commission of the offence.

Held, allowing the appeal:

(1) The magistrates' court had properly found that the appellant's aggressive and insulting behaviour *might have* occasioned a breach of the peace. It was unnecessary, for the purposes of s.35 of the Criminal Offences Ordinance, to show that a breach was *likely* to occur. Since the behaviour had continued for some time in close proximity to the landlord, this element of the offence was proved (paras. 9–11).

(2) However, the staircase where the incident had taken place was not a "public place." The staircase and landing were not part of the shop premises below the flat. The privacy of the staircase was emphasized by the glass door separating it from the shop entrance way, but even without that door, it was not public. Under s.35, the appellant could have been charged with committing the offence in a "staircase or other means of access to any occupied premises," but the Crown had chosen to frame the charge by reference to a public place and had failed to prove that element. The conviction would be quashed and the sentence set aside (paras. 12–13; para. 16).

(3) However, the appellant's appeal against conviction for resisting arrest would be dismissed. The arresting officer had acted within his powers of arrest under s.6(f) of the Criminal Procedure Ordinance, since he had had reasonable grounds for apprehending the continuance or renewal of a breach of the peace, especially given the physical confrontation with the witness that had been reported earlier. Accordingly, he had been acting in the execution of his duty when the appellant resisted arrest (paras. 14–16).

Cases cited:

(1) *Borastero* v. *Fountain*, 1979 Gib LR 75, distinguished.

(2) *R.* v. *Heffey*, [1981] Crim. L.R. 111, followed.

Legislation construed:

Criminal Offences Ordinance (1984 Edition), s.35, as amended by the Criminal Offences (Amendment) Ordinance, 1993 (No. 2 of 1993), s.10: The relevant terms of this section are set out at para. 12.

s.89(1), as amended by the Criminal Offences (Amendment) Ordinance, 1993 (No. 2 of 1993), s.31: "A person who . . . resists any police officer in the execution of his duty . . . is guilty of an offence . . ."

Criminal Procedure Ordinance (1984 Edition), s.6: The relevant terms of this section are set out at para. 14.

S.V. Catania for appellant;
J. Fernandez for the Crown.

1 **SCHOFIELD, C.J.:** David Bitton appeals against his conviction on charges of (a) behaving in a manner whereby a breach of the peace may have been occasioned, contrary to s.35 of the Criminal Offences Ordinance; and (b) resisting a police officer in the execution of his duty, contrary to s.89 of the Criminal Offences Ordinance.

2 The Red House is a well-known shop situated at 66–70 Main Street, Gibraltar. The entrance to the shop is set back from the street and there are display windows on either side of the entrance area. Between two display windows is the entrance to a stairway which leads to a flat belonging to Albert Serfaty. Mr. Serfaty had rented the flat to the appellant for five years, but had given the appellant notice to quit in 1997.

3 According to Mr. Serfaty, the appellant owed him some rent and they had agreed that the appellant would leave some of his furniture in the flat and Mr. Serfaty would forego claiming arrears of rent. On February 4th, 2000 the appellant went to Mr. Serfaty to return the key to the flat and wanted to collect his furniture. This led to a dispute between Mr. Serfaty and the appellant. Mr. Serfaty did not want the appellant to take the furniture and he put the appellant's personal belongings on the landing for him to remove, leaving the furniture, it seems, in the flat. According to Mr. Serfaty, the appellant became verbally aggressive and would not leave with his personal goods, and so Mr. Serfaty called the police.

4 The police were called to the scene twice on that afternoon. First, Const. Fabre arrived to find the appellant and Mr. Serfaty arguing, with the appellant being insulting and refusing to remove his goods because it was the Sabbath, and Mr. Serfaty insisting that they be removed that day. Constable Fabre left when the appellant agreed to get his son to help to remove the goods.

5 The police were called a little while later, and on this occasion Const. Fabre was joined by Sgt. Wood and Consts. Santos and Eccleston. Constable Fabre reported to Sgt. Wood and then left the scene. The officers found the appellant on the stairwell, removing his goods. He was shouting and in an aggressive mood. A Mr. Azzopardi was there and reported that there had been a scuffle but that he did not want to take the matter further. Mr. Azzopardi had marks to his face. The appellant was

shouting such words as "thief," "son-of-a-bitch" and other insults at Mr. Serfaty in the Spanish language.

6 The police officer warned him of his behaviour and asked him to calm down. After being warned of his behaviour three times, the appellant still did not calm down and Sgt. Wood gave instructions for him to be arrested. Constable Eccleston arrested the appellant but the appellant refused to be arrested and tried to release himself, saying he was not a criminal. Constable Eccleston, with the help of Const. Santos, placed handcuffs on the appellant and led him away.

7 The appellant testified that he had been trying to sell the furniture to a dealer and was shocked that Mr. Serfaty did not keep to the agreed list. He told Mr. Serfaty to call the police, and Const. Fabre arrived. He, the appellant, did not say anything bad to Mr. Serfaty, who had provoked him and sworn at him. The police told him to get a car and he called his son to bring one. He went away and when he returned the door was closed and Mr. Azzopardi was there. Mr. Azzopardi said he, the appellant, was not coming inside and put a screwdriver to his neck, which he tried to take away. The police officers arrived and told him that if he returned they would arrest him. He started collecting his things. His shoulder, which had been injured, was hurting. He said to himself that Mr. Serfaty was saying he was a thief and the police sergeant told his men to arrest him. One of the officers took his arm and he asked him to loosen his grip, as he was in pain. He did not resist the police officers.

8 Mr. Catania, for the appellant, has confined this appeal to questions of law. It is clear from the findings of guilt that the learned magistrates preferred the evidence of the police officers to that of the appellant, and there seems to be no complaint in that regard.

9 I must say I do not find merit in Mr. Catania's submission that the prosecution did not establish that the appellant was guilty of behaviour which might cause a breach of the peace. He says that insults alone cannot amount to behaviour likely to cause a breach of the peace and, furthermore, that it is necessary for the prosecution to prove that the person against whom the insults were directed would react violently to the defendant.

10 I am referred to the case of *Borastero* v. *Fountain* (1), in which a defendant was annoyed by the lights on the patio of the Jewish Club in Gibraltar, and shouted threatening words from the window of his flat and fired an imitation pistol therefrom at some elderly gentlemen who were at the Club. The finding of the learned Magistrate that the words uttered by the defendant, to the annoyance of the persons on the patio of the Club, were not shown to be uttered either with the intention to provoke a breach of the peace or in circumstances whereby a breach of the peace could have been occasioned, was upheld by Spry, C.J. in the Supreme Court.

11 The facts in *Borastero* v. *Fountain* can be distinguished from the facts in this case. In this case there was a greater proximity between the respective parties than in the *Borastero* case. Although at the time of the arrest of the appellant the police officers were between the appellant and Mr. Serfaty, there is evidence that Mr. Serfaty had been shouting loudly during the first incident and the appellant's insulting behaviour had continued for long enough for there to be a real danger that a breach of the peace could occur. The wording of s.35 of the Criminal Procedure Order requires proof not that there is a likelihood that a breach of the peace will be occasioned but that a breach of the peace "may have been" occasioned. That element of the charge was adequately proved.

12 Mr. Catania's second argument was that it was not proved that the incident occurred in a public place. Section 35 of the Criminal Offences Ordinance reads:

> "A person who, in or near to any public place or in any patio, yard, way, staircase or other means of access to any occupied premises or in the port of Gibraltar, makes or causes to be made any disturbance or who uses any threatening, abusive or insulting words or riotous, violent or indecent behaviour with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, or the annoyance of any person, is guilty of an offence and is liable on summary conviction to imprisonment for three months and to a fine at level 4 on the standard scale."

The prosecution could have charged the appellant with committing the alleged offence in "a staircase or other means of access to any occupied premises." That would have been met with the argument, says Mr. Catania, that it was not proved that the flat was occupied premises. Be that as it may, the prosecution elected to charge the appellant with an offence committed, they allege, in a public place, and that is what the prosecution had to prove.

13 In my judgment, the justices were in error in finding that the staircase where the incident occurred was a public place. The staircase and landing were not part of the shop premises. Certainly, the entrance way to the shop is a public place, but once a person moved out of that entrance way and into the stairway access to a private flat, he moved out of a public place. To add to the privacy of the staircase there is a glass door, but even without that door I would have held that the staircase is not a public place. Each case must depend on its own facts, but I am assisted by the English case (albeit in the Liverpool Crown Court) of *R.* v. *Heffey* (2), in which it was held that a third floor landing to a block of council flats in Liverpool was not a public place.

14 Mr. Catania argues in respect of the second count of resisting arrest, that as there is no offence committed in relation to the first count the

police officers had no cause or right to arrest the appellant, and therefore the police officer arresting him was not acting in the execution of his duty. The relevant portion of s.6 of the Criminal Procedure Ordinance reads:

> "Any police officer may, without prejudice to any other powers of arrest conferred by this Ordinance or any other law, without a warrant, arrest—
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> . . .
>
> (f) any person who in his view commits a breach of the peace or where he has reasonable grounds [for] apprehending the continuance or renewal of the breach of the peace . . ."

15 In my judgment, the appellant fell within this provision and the police officers had, at the very least, reasonable grounds to apprehend the continuance or renewal of a breach of the peace. As already stated, in my view, the appellant's behaviour amounted to behaviour that might have caused a breach of the peace. The police officers were cognizant of the fact that there had already been a scuffle with Mr. Azzopardi. They had every right to arrest the appellant.

16 Accordingly, I allow the appeal and quash the conviction in respect of the offence charged contrary to s.35 of the Criminal Offences Ordinance and set aside the sentence imposed thereon. I dismiss the appeal in respect of the offence charged under s.89 of the Criminal Offences Ordinance.

Appeal allowed in part.
